Supreme Court, U.S.
FILED

01 350 AUG 2 7 2001

OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

ROGER V. JOHNSON,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL MINAHAN
Counsel of Record
MINAHAN AND SHAPIRO, P.C.
Attorneys for Petitioner
165 South Union Blvd., Suite 366
Lakewood, Colorado 80228
(303) 986-0054

168670

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

67pp

QUESTIONS PRESENTED

1. Whether a statute that requires persons convicted of certain offenses not to be appointed to a position in the federal government requires the termination of a career employee years after he was appointed.

2. Whether the removal of a federal employee from his job promotes the efficiency of the service if the official who removed him wanted to impose a lesser penalty but was prevented from doing so.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. A Statute Requiring Persons Convicted Of Certain Offenses Not To Be Appointed To A Certain Positions In The Federal Government Does Not Require The Termination Of A Career Employee Years After He Has Been Appointed.	5
II. The Removal Of A Federal Employee From His Job Does Not Promote The Efficiency Of The Service If The Official Who Removed Him Wanted To Impose A Lesser Penalty And Was Prevented From Doing So.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	6, 7
Christensen v. Harris County, 120 S. Ct. 1655 (2000)	7
Douglas v. Veterans Administration, 5 MSPR 280 (1981)	9
Jakes v. Veterans Administration, 793 F.2d 293 (Fed. Cir. 1986)	8
Lachance v. Devall, 178 F.3d 1246 (Fed. Cir. 1999)	8, 9
Marbury v. Madison, 5 U.S. 137 (1803)	5
Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984)	9
National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981)	5
Pitsker v. Office of Personnel Management, 234 F.3d 1378 (Fed. Cir. 2000)	7

Cited Authorities

	Page
Robertson v. Department of Justice, 81 MSPR 658 (1999)	9
VanFossen v. Department of Housing and Urban Development, 748 F.2d 1579 (Fed. Cir. 1984)	9
Statutes:	
5 U.S.C. § 7311	5
5 U.S.C. § 7313	5
5 U.S.C. § 7326	5
5 U.S.C. § 7513	*passim*
25 U.S.C. § 3207	*passim*
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2106	1
31 U.S.C. § 1349(b)	6
Other Authorties:	
25 C.F.R. § 63.17 (1998)	7

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Federal Circuit Dated And Decided June 22, 2001 ..... 1a

Appendix B — Opinion And Order Of The United States Of America, Merit Systems Protection Board Dated August 23, 2000 ..... 12a

Appendix C — Initial Decision And Order Of The United States Of America, Merit Systems Protection Board, Denver Field Office Dated September 10, 1999 ..... 27a

Petitioner Roger V. Johnson respectfully petitions for a writ of certiorari to review the judgment of the Federal Circuit Court of Appeals in this case.

OPINIONS BELOW

The Federal Circuit's opinion (App. A) was not selected for official publication. The final decision of the Merit Systems Protection Board (App. B) is reported at *Johnson et al. v. Department of Health and Human Services*, 86 MSPR 501 (2000). The initial decision of the administrative judge of the Merit Systems Protection Board is at Appendix C. Initial decisions of administrative judges are not published or reported.

STATEMENT OF JURISDICTION

The judgment of the Federal Circuit was entered on June 22, 2001. This petition for writ of certiorari is filed within 90 days of the entry of judgment. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

This case involves two statutes applicable to federal employment.

The statute applicable to positions such as the one held by Mr. Johnson is 25 U.S.C. § 3207, which was enacted on November 28, 1990.

Paragraph (b) of Section 3207 provides:

> The minimum standards of character that are to be prescribed under this section shall ensure that

> none of the individuals appointed to positions described in subsection (a) have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under federal, state or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

Career federal employees like Mr. Johnson are also covered by 5 U.S.C. § 7513.

Paragraph (a) of Section 7513 provides:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this sub-chapter against an employee only for such cause as will promote the efficiency of the service.

STATEMENT OF THE CASE

Roger V. Johnson was fired from his job as a clinical nurse with the Indian Health Service in Pine Ridge, South Dakota on April 30, 1999. Respondent charged him with "failure to meet the suitability requirements of a clinical nurse who has regular contact or control over Indian children." Respondent alleged that his off duty misdemeanor conviction for a traffic dispute mandated his removal from employment under 25 U.S.C. § 3207. This statute requires Respondent to prescribe minimum standards of character to ensure that none of the individuals appointed to positions like that held by Mr. Johnson have been found guilty of any offense involving crimes of violence.

Mr. Johnson was involved in a "road rage" incident on November 14, 1998. While off duty and driving with his wife and infant child in another state, a local resident suddenly pulled in front of Mr. Johnson's car. Mr. Johnson slammed on his brakes. He and the other driver then got out of their vehicles and exchanged various unpleasantries, after which Mr. Johnson returned to his vehicle and drove away.

The other driver complained to the police about the confrontation and Mr. Johnson was charged with a crime. On March 2, 1999, he pled guilty to a charge of misdemeanor attempted assault. He was placed on probation for two years and required to pay a fine.

On March 26, 1999, Respondent notified Mr. Johnson that it proposed to remove him from employment because of his criminal conviction. Respondent charged that he was no longer suitable to hold the position of a clinical nurse under 25 U.S.C. § 3207. The Director of the hospital, Vern Donnell, issued a written decision to Mr. Johnson on April 21, 1999, upholding the proposal to remove him from employment.

Mr. Johnson appealed to the Merit Systems Protection Board. At the hearing, Mr. Donnell testified that he was unaware of any patient complaints against Mr. Johnson or any other arrests or convictions of any kind on his record. He testified that he was told that he had no choice but to fire Mr. Johnson and that if it were up to him he would have imposed a lesser penalty.

An administrative judge of the Merit Systems Protection Board issued an initial decision on September 10, 1999, reversing Mr. Johnson's removal from employment on the basis that 25 U.S.C. § 3207 did not require it. Respondent appealed and on August 23, 2000, the Merit Systems

Protection Board granted the appeal and reversed the initial decision of its administrative judge. In agreement with Respondent, the Merit Systems Protection Board concluded that Mr. Johnson's removal from employment was required by 25 U.S.C. § 3207.

Mr. Johnson appealed to the Federal Circuit. The Federal Circuit affirmed the final decision of the Merit Systems Protection Board on June 22, 2001. The Federal Circuit held that a "plain meaning interpretation" of 25 U.S.C. § 3207 is that individuals who have already been appointed to positions covered by this statute are no longer eligible to occupy such positions upon the commission of a covered offense. The Federal Circuit further held that Mr. Johnson's termination was "for such cause as will promote the efficiency of the service" under 5 U.S.C. § 7513. The Federal Circuit concluded that under this statute there was a nexus between Mr. Johnson's off duty misconduct and the efficiency of the service. The Federal Circuit did not address Mr. Johnson's argument that the penalty of removal, as opposed to some lesser penalty, was an abuse of discretion and did not promote the efficiency of the service.

REASONS FOR GRANTING THE WRIT

I.

A STATUTE REQUIRING PERSONS CONVICTED OF CERTAIN OFFENSES NOT TO BE APPOINTED TO A CERTAIN POSITIONS IN THE FEDERAL GOVERNMENT DOES NOT REQUIRE THE TERMINATION OF A CAREER EMPLOYEE YEARS AFTER HE HAS BEEN APPOINTED.

The statute at issue, 25 U.S.C. § 3207, requires Respondent to issue regulations to ensure that none of the individuals appointed to certain positions have been found guilty of certain offenses. The Federal Circuit concluded that a "plain meaning interpretation" of this statute extends it to employees who have already been appointed and requires their removal. The language of the statute itself, however, deals only with the act of "appointment." This term of art has had a settled meaning in federal employment since *Marbury v. Madison*, 5 U.S. 137, 156 (1803). An appointment takes place when the last act to be done by the appointing authority was performed. *Id. National Treasury Employees Union v. Reagan*, 663 F.2d 239, 242 (D.C. Cir. 1981).

Petitioner has repeatedly pointed to other statutes as solid proof that Congress can and does prescribe mandatory penalties for federal employees who have already been appointed to their positions. According to 5 U.S.C. § 7311, "An individual may not accept or hold a position in the government" if he participates in a strike. An individual receiving a felony conviction of inciting a riot or civil disorder "shall be removed from his position" under 5 U.S.C. § 7313. Congress provided in 5 U.S.C. § 7326 that an

employee who violates the prohibition on participating in political activities "shall be removed from his position." Congress even prescribed a lesser job consequence for employees who willfully misuse government vehicles. According to 31 U.S.C. § 1349(b) such employees "shall be suspended for at least one month." Thus, when Congress wants to impose a job consequence on a career employee for misconduct, it says so explicitly.

The Federal Circuit said that the statutory phrase "appointed to" does not exclude individuals who are already employed. Of course, it does not include them either. This is no surprise, since the statute deals with preventing the appointment of individuals who "have been found guilty of" certain offenses. Individuals who are already employed are not within this category.

The Federal Circuit also observed that the purpose of the statute – the prevention of child abuse and the protection of Indian children – "will be frustrated if HHS cannot remove an employee who has pled guilty or nolo contendere to a covered offense after they become employed." No one has ever argued that Respondent is powerless to remove an employee who has pled guilty to a covered offense. The federal government has enjoyed this prerogative for generations under 5 U.S.C. § 7513, to be discussed below. That statute, however, requires that removal from employment be for such cause as promotes the efficiency of the service and does not mandate *automatic* removal for any offense.

The Federal Circuit indicates that it was appropriate for the Merit Systems Protection Board to defer to Respondent's interpretation of 25 U.S.C. § 3207 under *Chevron USA, Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). This is incorrect. Respondent's interpretation of this statute as requiring automatic removal of government employees is not based on any formal adjudication or notice and comment rule-making. As the Federal Circuit noted, Respondent had not even promulgated regulations under this statute, even though it was enacted almost ten years before Mr. Johnson was fired. Stranger yet, Respondent's sister agency, the Department of the Interior, had issued its own regulations allowing its officials discretion in deciding whether to remove employees with criminal offenses from child care positions under this law. 25 C.F.R. § 63.17 (1998) *Chevron* deference is unwarranted. *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000); *Pitsker v. Office of Personnel Management*, 234 F.3d 1378 (Fed. Cir. 2000).

Potential appointees are very different from career employees. They do not enjoy the same rights as career employees to be removed for only such cause as promotes the efficiency of the service. In contrast, the government has invested a considerable amount of time and money to train and develop career employees. Their personalities and characters are already known to the employer. Their job histories or exemplary service may demonstrate that despite a misdemeanor conviction they remain suitable for their positions. Certainly this was the case for Mr. Johnson, as the management official who fired him openly admitted he thought the action was unnecessary.

A statute dealing with what types of individuals should not be appointed to a position, such as 25 U.S.C. § 3207, should not be interpreted to tie the hands of a federal agency and the courts by requiring the termination of a long-term valuable employee.

II.

THE REMOVAL OF A FEDERAL EMPLOYEE FROM HIS JOB DOES NOT PROMOTE THE EFFICIENCY OF THE SERVICE IF THE OFFICIAL WHO REMOVED HIM WANTED TO IMPOSE A LESSER PENALTY AND WAS PREVENTED FROM DOING SO.

Petitioner reminded the Federal Circuit that one of its earlier decisions supported his argument that he could only be removed for such cause as promoted the efficiency of the service, whether or not he would have been "unqualified" for his job prior to appointment. The employee in *Jakes v. Veterans Administration*, 793 F.2d 293 (Fed. Cir. 1986) was fired a number of years after he was appointed when his agency discovered that he was unqualified for his original appointment in the federal service. The Federal Circuit reversed, concluding that his removal from employment was not required by law and that it did not promote the efficiency of the service to terminate him.

In the present appeal, the Federal Circuit concluded that 5 U.S.C. § 7513 and 25 U.S.C. § 3207 *both* applied to the case. Applying 5 U.S.C. § 7513, the Federal Circuit concluded that there was a nexus between Mr. Johnson's misconduct and the efficiency of the service. Unfortunately, the Federal Circuit neglected to perform the second half of the analysis under § 7513.

A finding of nexus simply means that *some* discipline is appropriate. The discipline actually chosen by the federal agency needs to be examined as well. Discipline which is an abuse of discretion does not promote the efficiency of the service. *Lachance v. Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999).

The Merit Systems Protection Board has long required federal agencies to consider a number of mitigating and aggravating factors in arriving at a penalty determination. *Douglas v. Veterans Administration*, 5 MSPR 280, 305 (1981). The Federal Circuit has approved of this requirement and has on occasion overturned the selection of a penalty found to be unduly harsh and mitigated it to a lesser penalty. *E.g.*, *VanFossen v. Department of Housing and Urban Development*, 748 F.2d 1579 (Fed. Cir. 1984); *Miguel v. Department of the Army*, 727 F.2d 1081 (Fed. Cir. 1984). Most important, the Federal Circuit has ruled that "if the Board discerns from the record of the proceedings that the agency desires imposition of a lesser penalty, the Board must afford the agency an opportunity to institute such a lesser penalty." *Lachance v. Devall*, *supra*, at 1260 (Fed. Cir. 1999).

It is undisputed in the present case that the agency official who fired Mr. Johnson wanted to impose a lesser penalty but was prevented from doing so. When an agency official who carries out an action against a federal employee expresses the view that the penalty imposed upon the employee is excessive, mitigation of the penalty normally follows. *Robertson v. Department of Justice*, 81 MSPR 658, 665 (1999).

In deciding that 5 U.S.C. § 7513 applied to this case but in refusing to consider the appropriateness of the penalty imposed on Mr. Johnson, the Federal Circuit plainly erred. The penalty of removal from employment does not promote the efficiency of the service.

CONCLUSION

For the reasons set forth above, Mr. Johnson asks the Court to grant this petition for a writ of certiorari.

Respectfully submitted,

DANIEL MINAHAN
Counsel of Record
MINAHAN AND SHAPIRO, P.C.
Attorneys for Petitioner
165 South Union Blvd., Suite 366
Lakewood, Colorado 80228
(303) 986-0054

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND DECIDED JUNE 22, 2001

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

00-3435

ROGER V. JOHNSON,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

DECIDED: June 22, 2001

Before NEWMAN, MICHEL, and RADER, *Circuit Judges*.

PER CURIAM.

Roger V. Johnson appeals a final decision of the Merit Systems Protection Board (MSPB or Board), Docket No. DE-0752-99-0219-I-1, sustaining his removal from the position of Clinical Nurse with the Indian Health Service (IHS) of the Department of Health and Human Services (HHS), and reversing the Board's initial decision with respect to its statutory interpretation of 25 U.S.C. § 3207 (1994).

Appendix A

Because substantial evidence supports the Board's final decision, which was not arbitrary, capricious, or an abuse of discretion, this court *affirms*.

I.

Prior to his removal on April 30, 1999, HHS employed Mr. Johnson for approximately six years as a Clinical Nurse, GS-09. At the time of his removal, he was working at an IHS clinic in Pine Ridge, South Dakota. Before November 1998, Mr. Johnson received no prior discipline in the Federal service, and had no record of any criminal misconduct. On November 14, 1998, however, while driving off-duty with his family in Nebraska, Mr. Johnson engaged in a heated verbal dispute with a local driver.

After the local driver complained to a sheriff's office, the County Court of Sheridan County, Nebraska, filed a complaint against Mr. Johnson with two felony counts: (1) threatening to commit a crime of violence with intent to terrorize another; and (2) using a firearm, or other deadly weapon, to commit a felony to wit: terroristic threat. Mr. Johnson told his supervisor that criminal charges had been filed against him. Consequently, Mr. Johnson was indefinitely suspended from his position without pay, pending the outcome of the criminal charges. On January 26, 1999, Mr. Johnson pled guilty to the lesser misdemeanor offense of attempted terroristic threats, i.e., that he attempted to commit a crime of violence with intent to terrorize another or with reckless disregard of the risk of causing such terror. On March 2, 1999, he was sentenced to a two-year probation and ordered to undergo counseling and pay a fine.

Approximately three weeks later, the Director of Nursing at his clinic proposed Mr. Johnson's removal for "failure to meet the suitability requirements of a Clinical Nurse who has regular contact or control over Indian children." Specifically, because his duties as a Clinical Nurse required Mr. Johnson to have regular contact with Indian children, and because he entered a plea of "nolo contendere" to a crime against a person under state law, the Director considered him unsuitable to remain employed as a Clinical Nurse under the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3207. On April 21, 1999, the Service Unit Director at the Pine Ridge Indian Hospital removed Mr. Johnson from his position, finding that his removal would promote efficiency of the service based on his obligation under § 3207.

Mr. Johnson appealed his removal to the MSPB. In its initial decision, the administrative judge reversed the removal action, stating that 25 U.S.C. § 3207 was punitive in nature, and therefore must be construed in favor of Mr. Johnson. *Johnson v. Dep't of Health & Human Serv.*, Docket No. DE-0752-99-0219-I-1, slip op. at 14 (M.S.P.B. Sept. 10, 1999) (*Initial Decision*). The Board noted that HHS proposed rules and guidelines interpreting § 3207, providing that employees in positions having regular contact with children were automatically ineligible for employment if they had been convicted of crimes against persons, were not codified or in effect at the time of Mr. Johnson's removal. *Initial Decision*, slip op. at 9, 12. The Board also found that HHS failed to show that it had defined "crimes against persons" under § 3207. On the other hand, relevant regulations of the Bureau of Indian Affairs (BIA) were in effect at the time of

Mr. Johnson's removal. While the BIA defined "crimes against persons" under local law, it gave its managers discretion to interpret whether the crime was serious or significant enough to be covered under § 3207. 25 C.F.R. § 63.19(a) (1998) (stating that the employer "may deny employment or dismiss an employee when an individual has been found guilty of or entered a plea of guilty or nolo contendere to any Federal, state or tribal offense involving . . . crimes against persons").

Relying on BIA regulations as significant guidance, the administrative judge found that Mr. Johnson's misdemeanor conviction for off-duty threats did not render him unsuitable for employment as a Clinical Nurse. Moreover, the administrative judge gave weight to Mr. Johnson's argument that the specific language of § 3207 required multiple "crimes against persons." Thus, the administrative judge found that Mr. Johnson was suitable for continued employment as a Clinical Nurse, and reversed the removal action.

After granting HHS's petition for review, however, the full Board reversed with respect to the interpretation of 25 U.S.C. § 3207. *Johnson et al. v. Dep't of Health & Human Serv.*, Docket No. DE-0752-99-0219-I-1, slip op. at 1-2 (M.S.P.B. Aug. 23, 2000) (*Final Decision*). Specifically, the Board found that the administrative judge erred by relying on BIA regulations and finding that the adjudicating agency official had discretion to consider mitigating factors under § 3207.

In accordance with *Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc.*, 467 U.S. 837, 842-43

(1984), the Board looked to see whether Congress had directly spoken via the language of § 3207. Based on the plain meaning of the statute, the Board found that § 3207(b) required, as the minimum eligibility standard for holding a covered position, that an employee could not be found guilty of, or enter a plea of nolo contendere or guilty to, a covered crime. *Final Decision*, slip op. at 8. The Board determined that if an individual who is being considered for employment, or who is already employed, fails to meet that minimum eligibility standard, that individual cannot be appointed or continue to be appointed to that position. *Id.*

The Board also found that the statute was clearly protective, rather than punitive, because the purpose of the statute was to prevent child abuse and protect Indian children. *Id.* at 9. Based on that purpose and the history of § 3207, the Board found that Congress created a presumption of a nexus between an employee's violation of the minimum standard of character and appointment to or continued service in a covered position. Consequently, the Board determined that there was a nexus between Mr. Johnson's off-duty misconduct and his job-related responsibilities as a Clinical Nurse. Although the Board acknowledged that it could reduce a penalty imposed by an agency if certain mitigating circumstances existed under *Douglas*, the Board stated that the plain meaning of § 3207 prohibits individuals from holding an appointment to a covered position if they have been found guilty of, or enter a plea of nolo contendere or guilty to, a covered crime. Because HHS showed that there was no other position (i.e., one not involving contact with Indian children) to which Mr. Johnson could have been reassigned, the Board found that HHS was justified in removing him from his position. *Final Decision*, slip op. at 11.

Thus, the Board sustained Mr. Johnson's removal. Mr. Johnson appeals to this court, which has exclusive appellate jurisdiction. 28 U.S.C. § 1295(a)(9) (1994); 5 U.S.C. § 7703(b)(1) (Supp. IV 1998).

II.

This court must affirm any Board decision not found to be: (1) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedure required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1996); *Hayes v. Dep't of Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1994). This court must reverse a decision of the Board if that decision is not in accordance with the requirements of the Due Process Clause of the Fifth Amendment or any other constitutional provision. *Khan v. United States*, 201 F.3d 1375, 1382 (Fed. Cir. 2000).

On appeal to this court, Mr. Johnson argues that if 25 U.S.C. § 3207 creates an "irrebutable presumption" that conviction of certain crimes disqualifies an individual from Federal employment, it violates the right to substantive due process under the Fifth Amendment, based on reasoning in *Harry G. Peterson v. Dep't of Health & Human Serv.*, Docket No. A98-0264-CV, slip op. at 18-19 (D. Alaska Sept. 28, 2000). *Peterson*, an unpublished decision from a district court, however, is not binding on this court.

Moreover, the burden is on Mr. Johnson to show that there is no rational connection between his removal action under § 3207 and a valid interest of Congress. *Harrah Indep.*

Sch. Dist. v. Martin, 444 U.S. 194, 198 (1979) (stating that "the burden is on respondent to show that there is no rational connection between the Board's action and its conceded interest in providing students with competent, well-trained teachers"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643 (1974) (concluding that "the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction"). Because Mr. Johnson's duties as a Clinical Nurse included regular contact with Indian children, his removal, based on his misdemeanor conviction of attempted terroristic threats, had a rational relationship to the valid interest of preventing child abuse and protecting Indian children.

Mr. Johnson also asserts on appeal that HHS was not required to remove Mr. Johnson from his position under § 3207. According to Mr. Johnson, the statute refers to an individual who is "appointed," not "continued to be appointed." Moreover, Mr. Johnson argues that HHS was required to, but did not, prescribe minimum standards of character for employees by regulations under § 3207.

Section 3207, entitled "Character investigations," requires that the Secretary of the Interior and Secretary of Health and Human Services:

> (1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,

> (2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and
>
> (3) prescribe by regulations minimum standards of character that each of such individuals must meet *to be appointed* to such positions.

25 U.S.C. § 3207(a) (1994) (emphasis added).

Paragraph (b) of § 3207 also provides:

> The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals *appointed to* positions described in subsection (a) have been found guilty of, or entered a plea of nolo contendere or guilty to, *any offense* under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or *crimes against persons.*

25 U.S.C. § 3207(b) (1994) (emphasis added).

Neither party disputes that Mr. Johnson's position as a Clinical Nurse is covered under § 3207(a)(1). The Board interpreted "individuals appointed to positions" in § 3207(b) to be individuals who either are considered for employment or are already employed in a position "described in

subsection (a)." *Final Decision*, slip op. at 8. This court agrees with that plain meaning interpretation of the statute, particularly in light of the "shall ensure" language in § 3207(b). As discussed by the Board, "[t]he only way to 'ensure' that none of the individuals appointed to a covered position have been 'found guilty of, or entered a plea of nolo contendere or guilty to,' a covered crime is to make that prohibition the base eligibility require for obtaining and/or retaining employment in a covered position." *Id.*

While paragraph (b) uses the words "appointed to," that language does not exclude individuals who are already employed. Employed individuals were at one point "appointed to" their position. Moreover, the purpose of the statute, as discussed above, is to prevent child abuse and protect Indian children. That purpose will be frustrated if HHS cannot remove an employee who has pled guilty or nolo contendere to a covered offense after they become employed. Employees who plead nolo contendere to a covered offense after employment pose just as great a threat to Indian children as employees who plead nolo contendere to the same offense before they are employed.

In addition, contrary to Mr. Johnson's assertion, § 3207(b) provides sufficient minimum standards upon which HHS can take action, regardless of whether the agency has yet promulgated specific regulations, as required under paragraph (a)(3). As discussed in paragraph (b), the minimum standards of character must ensure that no appointed individual in a covered position has entered a plea of nolo contendere or guilty to any covered offense.

Mr. Johnson also asserts that a literal reading of § 3207 indicates that the statute applies to those who enter a plea of no contest to "*crimes* of violence" or "*crimes* against persons." The word "crimes," according to Mr. Johnson, requires that an employee commit more than one crime. As discussed by the Board in its final decision, however, the key word in paragraph (b) is "offense," which is in the singular form.[1] *Final Decision*, slip op. at 7-8. The plural terms in paragraph (b), such as "crimes of violence" and "crimes against persons," refer to a list of the types of crimes that Congress intended to fall within the statute. Thus, § 3207(b) encompasses Mr. Johnson's single offense under Nebraska law involving crimes against persons.

Under 5 U.S.C. § 7513(a) (1994), a federal employee may be removed "for such cause as will promote the efficiency of the service." *Crofoot v. Gov't Printing Office*, 761 F.2d 661, 664 (Fed. Cir. 1985). Thus, there must be a nexus between the employee's misconduct and the efficiency of the service. The nexus may be established either by specific evidence or by the nature of the conduct if it is so egregious as to "speak for itself." *Graybill v. U.S. Postal*

---

1. Compared to § 3207(b) as amended on December 27, 2000, which now states: The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) have been found guilty of, or entered a plea of nolo contendere or guilty to, *any felonious offense, or any of two or more misdemeanor offenses,* under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; crimes against persons; or offenses committed against children. 25 U.S.C. § 3207(b) (2001) (emphasis added).

Serv., 782 F.2d 1567 (Fed. Cir. 1986) (removal for criminal sexual misconduct upheld). Mr. Johnson contends that the Board erroneously considered the issue of nexus under § 7513. Mr. Johnson appears to argue that if he was prohibited by law under § 3207 from holding his position as a Clinical Nurse, no further analysis was necessary.

Sections 7513 and 3207, however, are not mutually exclusive. Under the terms of § 3207, the act of pleading nolo contendere to an offense under state law involving crimes against persons, or any other covered offense, either inherently involves a nexus between an employee's misconduct and the efficiency of the service, or is so egregious as to "speak for itself." While this court agrees that Mr. Johnson's misdemeanor in this case may not be so egregious as to "speak for itself," a nexus clearly exists between his misconduct and efficiency of the service (i.e., one that necessarily involves the prevention of child abuse and protection of Indian children).

For the above-mentioned reasons, the Board's decision to affirm Mr. Johnson's removal from the position of Clinical Nurse is not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. The final decision of the Board is therefore affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES OF AMERICA, MERIT SYSTEMS PROTECTION BOARD DATED AUGUST 23, 2000

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBERS
DE-0752-99-0219-I-1
DA-0752-99-0315-I-1
DA-0752-99-0311-I-1
DE-0752-99-0299-I-1

ROGER V. JOHNSON, QUINTON E. CASE, PHILLIP G. DAUGHERTY, AND LOIS DELONG,

Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Agency.

DATE: AUG 23 2000

* * *

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

Appendix B

OPINION AND ORDER

¶1 The agency petitions for review of the initial decisions that reversed its removal actions. Because these appeals involve similar facts and issues, we have CONSOLIDATED them for review. 5 C.F.R. § 1201.36(a)(1). For the reasons discussed below, we GRANT the agency's petitions, AFFIRM the initial decisions findings in connection with the appellants' failure to prove their affirmative defenses, REVERSE the initial decisions with respect to the administrative judges' findings regarding the statutory interpretation of 25 U.S.C. § 3207, and SUSTAIN the removal actions.

BACKGROUND

¶2 The agency removed the appellants from their positions of employment based on violations of the minimum standards of character under the Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 1990 U.S.C.C.A.N. (104 Stat.) 4544, codified at 25 U.S.C. § 3207 (the "Act" or "statute"). As fully set forth in the analysis section of this decision, the Act requires the agency to "compile a list of all authorized positions . . . the duties and responsibilities of which involve regular contact with, or control over, Indian children . . ." ("covered position") and to "conduct an investigation of the character of each individual who is employed or is being considered for employment" in a covered position. 25 U.S.C. § 3207(a). The statute states that "[t]he minimum standards of character . . . shall ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered

a plea of nolo contendere, or guilty to, any offense under federal, state, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution, or crimes against persons" ("covered crimes"). 25 U.S.C. § 3207(b).

¶3 The issue presented is whether the agency correctly interpreted the language of the Act as requiring the removal of the appellants from covered positions because they had been found guilty of, or had entered a plea of no contest or guilty to, covered crimes. This is a case of first impression for the Board. We have set forth below the individual facts of each case.

¶4 Johnson was employed as a Clinical Nurse, GS-9, at the agency's Indian Health Center in Pine Ridge South Dakota. Johnson Initial Appeal File 1 DE-0752-99-0219-I-1 (IAF1), Tab 1 and Tab 12, Subtab 4K at 20. Case was employed as a Medical Technician, GS-0645-04, and Daugherty was employed as a Clinical Nurse, GS-0610-09, both by the Oklahoma City Area Indian Health in the W.W. Hastings Indian Hospital in Tahlequah, Oklahoma. Case Initial Appeal File 2 DA-0752-99-315-I-1 (IAF2), Tab 1 and Daugherty Initial Appeal File 3 DA-0752-99-0311-I-1 (IAF3), Tab 1. Delong was employed as a Substance Abuse Specialist at the Aconma-Caoncito-Lauguna Service Unit, San Fidel, New Mexico. Delong Initial Appeal File 4 DE-0752-99-299-I-1 (IAF4). The agency classified the appellants' positions as covered positions under the Act.

¶5 As the result of background investigations required by the Act, the agency discovered that each appellant had been

convicted of, or pled guilty or no contest to a crime against persons. In 1999, Johnson pled no contest to the charge of attempted terroristic threats.[1] IAF1, Tab 12, Subtab 4F. In 1992 and 1996, Case pled guilty to two charges of assault and battery. IAF2, Tab 6, Subtab 4e. While Daugherty was serving in the Marine Corps in 1983, he was convicted by a special military court martial of indecent assault with intent to gratify his lust and/or sexual desires. IAF3, Tab 7, Subtab 4d. In 1974, Delong was convicted of assault and battery. IAF4, Tab 6, Subtab 4i.

¶6 Prior to proposing their removals and as required by the Act, 25 U.S.C. § 3207(b), the agency searched for available vacant positions to which the appellants could have been reassigned; however, no such positions were available that did not have contact with Indian children. Consequently, the agency removed Johnson for failure to meet the suitability requirements of a clinical nurse who has regular contact with Indian children. IAF1, Tab 12, Subtab 4C. In separate actions, the agency removed Case and Daugherty for: (1) loss of qualifications and ineligibility to perform the duties of the position; and (2) falsification of the application for Federal employment.[2] IAF2, Tab 6, Subtab 4e; IAF3, Tab 7,

---

1. This is a class I misdemeanor, and it is classified as a crime against persons by the State of Nebraska. Neb. Rev. St. § 28-311.01. IAF1, Tab 12, Subtab 4H.

2. Both Case and Daugherty failed to disclose these convictions on their employment applications. The administrative judge did not sustain these charges. Because the agency has not raised the issue and based on our findings in this Opinion and Order, it is not necessary for us to analyze whether the falsification charges were sustainable.

Subtab 4d. Delong was removed for her loss of eligibility to perform the duties of the position for which she was hired. The appellants filed separate appeals.

¶7 Although the administrative judges issued separate initial decisions, they used the same rationale to reverse the agency's removal actions. Basically, they found that the plain language of the Act did not mandate the removals. Johnson Initial Decision 1 (ID1), IAF1, Tab 24; Case Initial Decision (ID2), IAF2, Tab 20; Daugherty Initial Decision (ID3), IAF3, Tab 17; and Delong Initial Decision (ID4), IAF4, Tab 23.[3] In finding that the removals were not sustainable, the administrative judges relied on regulations issued in accordance with the Act by the Bureau of Indian Affairs (BIA), the agency's sister agency. The BIA regulations authorized the agency to consider mitigating circumstances in determining whether an employee should be terminated based on a violation of the minimum standards of character. *Id.*

¶8 The agency filed timely petitions for review arguing that the administrative judges erroneously interpreted section 3207 of the Act. Johnson Petition for Review File 1 DE-0752-99-0219-I-1 (PFRF1), Tab 2; Case Petition for Review File 2 DA-0752-99-0315-I-1 (PFRF2); Daugherty Petition for Review File 3 DA-0752-99-0311-I-1 (PFRF3); and Delong Petition for Review File 4 DE-0752-99-0299-I-1 (PFRF4). Additionally, the agency requested that the Board take judicial notice of the BIA's regulatory amendment, which revised the regulations to state that "[a]n

---

3. While the administrative judge in the Delong case did not cite to the regulations, he applied similar factors in determining that the charge was not sustainable. ID4 at 6.

employer *must* deny employment or dismiss any employee when he has been found guilty of or entered a plea of guilty or nolo contendere" to a covered crime. 64 Fed. Reg. 66,770, 66,771 (1999) (to be codified at 25 C.F.R. § 63.19).[4] In their separately filed responses, the appellants argue that the administrative judges correctly interpreted the statute based on the version of the regulation in effect at the time of the removals and that the amendment does not mandate the reversal of the initial decisions because it cannot be applied retroactively in these cases.[5]

---

4. Although the agency in these appeals had issued proposed regulations in accordance with the Act, they were not final at the time of the appellants' removals. Therefore, after finding that the statute was silent as to whether the agency had discretion to consider mitigating circumstances in connection with covered crimes, the administrative judges looked to the regulations issued by the BIA for guidance. The BIA regulations, found at 25 C.F.R. § 63.19, were promulgated under 25 U.S.C. § 3207(a)(3). The regulations provided that the employer "*may* deny employment or dismiss an employee when an individual has been found guilty of or entered a plea of guilty or nolo contendere to any Federal, state, or tribal offense involving crimes against persons." 25 C.F.R. § 63.19(a) (emphasis added). On November 30, 1999, the BIA regulations were amended to change "may" to "must." 64 Fed. Reg. 66,771 (1999). Again, because of our analysis, it is not necessary to address either agencies' regulations or the BIA amendments.

5. We note that Daugherty labeled his filing as a "cross petition for review"; however, because it asks us to sustain the initial decision and raises no additional issues, it constitutes his response to the agency's petition for review.

Appendix B

ANALYSIS

¶9 The agency argues that the administrative judges' interpretation of 25 U.S.C. § 3207 is erroneous as a matter of law because it is contrary to the plain meaning of the language in the statute. For the reasons discussed below, we find that the administrative judges erred by relying on the BIA regulations and finding that the adjudicating agency official has discretion to consider mitigating factors when determining whether an employee should be removed based on a violation of the minimum standard of character under the Act.

¶10 The starting point of every case involving statutory construction must be the language of the statute itself. *Todd v. Department of Defense*, 63 M.S.P.R. 4, 7 (1994), *aff'd*, 55 F.3d 1574 (Fed. Cir. 1995). In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), the Supreme Court provided the framework under which a court is to review an agency's construction of a statute that it administers. Consistent with *Chevron*, the Board must follow a two-step process in its review. The first step is to determine whether Congress has spoken directly to the issue through the language of the statute. *Id.* "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* The Board reaches the second step only if it finds that Congress did not directly address the issue in question and the statute is silent or ambiguous with respect to the specific issue. The second step is to determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

If the construction is permissible, the reviewing authority should defer to the agency's interpretation. We conclude that the initial decisions improperly reversed the mandated order of *Chevron* analysis.

¶11 In applying *Chevron*, we must first look at the applicable language of the statute. The pertinent portion of the statutory language is as follows:

> **§ 3207. Character investigations**
>
> **(a) By Secretary of the Interior and the Secretary of Health and Human Services**
>
> The Secretary and the Secretary of Health and Human Services shall —
>
> > (1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,
> >
> > (2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and
> >
> > (3) prescribe by regulations minimum standards of character that each of such

> individuals must meet to be appointed to such positions.
>
> **(b) Criminal records**
>
> The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

25 U.S.C. § 3207. We begin by addressing whether section 3207 applies to both current and prospective employees. We reject the administrative judge's finding in the *Delong* case, IAF4, ID4 at 4-5, and Johnson's argument on petition for review, PFRF1, Tab 4 at 3-4, that the statute only covers new appointments. Because subsection (b) states that the minimum standards apply to "individuals appointed to positions described in subsection (a)" and because subsection (a) refers to "each individual who is employed, or is being considered for employment" in a covered position, we find that the minimum standards apply to both current and prospective employees.

¶12 Additionally, Johnson argued that the term "crimes against persons" means multiple crimes or acts. *See* PFRF1 at 5. We reject this interpretation because it distorts the plain language of the Act. The statute requires that the minimum

standards of character ensure that none of the individuals appointed to covered positions have been found guilty of, or entered a plea of no contest or guilty to, "any *offense* under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons." 25 U.S.C. § 3207(b) (emphasis added). The key word in this provision is "offense," which is in the singular form. We note that the plural terms, "crimes of violence" and "crimes against persons," refer to a category of crimes that Congress intended to be within the purview of the statute. We find that the term "crimes against persons" describes one type of offense that is actionable under the statute.

¶13 We now turn to the main issue of whether the language of section 3207 mandated the removal actions. In subsection (a)(3), Congress authorized the agency to "prescribe by regulations minimum standards of character." By using the word "shall" in subsection (b), it mandated that those standards must "ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere or guilty to, . . ." a covered crime. 25 U.S.C. § 3207(b). The only way to "ensure" that none of the individuals appointed to a covered position have been "found guilty of, or entered a plea of nolo contendere or guilty to," a covered crime is to make that prohibition the base eligibility requirement for obtaining and/or retaining employment in a covered position. Therefore, under its plain meaning, we find that section 3207(b) requires, as the minimum eligibility standard for holding a covered position ("the minimum standard"), that the individual who is employed, or is being considered for employment, must not

have been found guilty of, or entered a plea of nolo contendere or guilty to, a covered crime.

¶14 Even though the appellants' argument that the plain language of the statute does not include the words "remove" or "dismiss" is technically correct, we find that two necessary conclusions naturally follow from the plain meaning of subsection 3207(b): (1) if an individual who is being considered for employment does not meet the minimum standard, he cannot be appointed to a covered position; and (2) if an individual who is employed in a covered position fails to meet the minimum standard, he cannot continue to be appointed to that position. If a character investigation discloses that an individual has violated the minimum standard, removal from the covered position is required under the language of the statute because that is the only way to "ensure" that "none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere or guilty to," a covered crime. Neither the appellants nor the administrative judges indicated how the statutory mandate could otherwise be satisfied.

¶15 Our interpretation of section 3207 is supported by section 3201 of the Act. Section 3201(a) provides, in pertinent part, that, after holding hearings on the problem of child abuse on Indian reservations, Congress found that multiple incidents of sexual abuse of Indian children had been perpetrated by Federal employees and that Federal background investigations of Federal employees who care for Indian children had been deficient. 25 U.S.C. § 3201(a)(1)(C) and (D). The language and history of the Act show that Congress intended to afford the maximum

protection for Indian children and that there were concerns about incidents where Federal employees had abused them.

¶16 We find that the statute's purpose is clearly protective, rather than punitive. In section 3201(a)(2)(A), Congress declared that one of its major goals is to identify the scope of incidents of abuse of Indian children and "*to reduce such incidents.*" 25 U.S.C. § 3201(a)(2)(A) (emphasis added). The Act identifies a narrow category of individuals, those who have been convicted of or pled no contest or guilty to, a covered crime, and ensures that those individuals do not hold positions within the agency where their duties will involve contact with or control over Indian children. This serves the overall goals of the Act, to prevent child abuse, and protect Indian children. Additionally, we note that one of the stated purposes of the Act is to "authorize *such other actions as are necessary to ensure effective child protection* in Indian country" and on Indian reservations. 25 U.S.C. § 3201(b)(3) and (9) (emphasis added). Given this Congressional statement, we find no valid basis in the appellants' argument for prohibiting new appointments while not terminating the appointments of those holding covered positions who have been found guilty of, or entered a plea of no contest or guilty to, a covered crime. In order to enforce the minimum standard under section 3207(b), we find that, if a character investigation reveals that an individual who holds a covered position has violated the minimum standard, removal from that position is a necessary action to ensure effective Indian child protection and to reduce incidents of Indian child abuse perpetrated by Federal employees.

¶17 Here, it is undisputed that the appellants held covered positions and that they each violated the minimum standard of character by either being convicted of, or pleading guilty or no contest to a crime that is classified as a crime against persons. We find that the agency properly removed the appellants from their positions as required by the plain language of the statute.

There is a nexus between the conduct and promotion of the efficiency of service.

¶18 The nexus limitation imposed by 5 U.S.C. § 7513(a), requires an agency to show by preponderant evidence "the necessary connection between the employee's off duty misconduct and the employee's job-related responsibilities." *White v. U.S. Postal Service*, 768 F.2d 334, 335-36 (Fed. Cir. 1985). Nexus may be shown in one of three ways: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the conduct; (2) a showing by preponderant evidence that the conduct affects the employee's or his coworkers' job performance, or management's trust and confidence in the employee's job performance; or (3) a showing by preponderant evidence that the conduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987).

¶19 Here, by enacting the mandatory language of section 3207, we find that Congress created a presumption of nexus between an employee's violation of the minimum standard of character and appointment to or continued service in a covered position. Section 3207 reflects the view of Congress

that prohibiting individuals who have been found guilty of, or entered a plea of no contest or guilty to, a covered crime from holding a covered position promotes the efficiency of the agency's service.

¶20 Appellants Daugherty and Delong argued that a nexus could not be presumed because the violations of the minimum standard of character occurred more than ten years ago. Further, all of the appellants asserted that it is undisputed that the violations never affected their job performance, or management's trust and confidence in them. Although we acknowledge that the removals were unrelated to the appellants' job performance, nevertheless, because the language of the statute does not limit its coverage to a specific time period, we disagree with their assertion that nexus cannot be presumed. We find that the appellants' claims are insufficient to rebut the presumption of nexus and that the history and purpose of the statute establish the vital connection between the appellants' off duty conduct and the efficiency of the service.

¶21 We also reject the appellants' claims that the penalty of removal is unreasonable and that it should be mitigated. The Board has held that it has authority to reduce the penalty imposed by an agency if certain mitigating circumstances exist. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). However, in the circumstances of these cases, the plain meaning of section 3207 prohibits individuals from holding an appointment to a covered position if they have been found guilty of, or entered a plea of no contest or guilty to, a covered crime. Further, the agency showed that there were no other positions to which the appellants could have

been reassigned, given the number of its positions that involve contact with Indian children. *See* IAF1, Tab 12, Subtabs 4A, 4C; IAF2, Tab 6, Subtab E and Tab 13, Subtabs 1A, 4F, 4G; IAF3, Tab 7, Subtabs 1A, 4E; IAF4, Tab 6, Subtabs 4B, 4H. Accordingly, we find that the agency was justified in removing them, and we sustain the removal actions.

ORDER

¶22 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

* * *

FOR THE BOARD: s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C — INITIAL DECISION AND ORDER OF THE UNITED STATES OF AMERICA, MERIT SYSTEMS PROTECTION BOARD, DENVER FIELD OFFICE DATED SEPTEMBER 10, 1999

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

DOCKET NUMBER
DE-0752-99-0219-I-1

ROGER V. JOHNSON,

Appellant,

v.

DEPARTMENT OF HEALTH &
HUMAN SERVICES,

Agency.

DATE: *September 10, 1999*

* * *

BEFORE

Laura M. Albornoz
Administrative Judge

INITIAL DECISION

Appendix C

INTRODUCTION

The appellant filed a timely appeal of the agency's action that removed him, pursuant to 25 U.S.C. § 3207, from the position of Clinical Nurse, GS-09, effective April 30, 1999, for failure to meet the suitability requirements of his position. I find that the Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511, 7512, 7513(d) and 7701(a).

For the reasons set forth below, the agency's action is REVERSED.

ANALYSIS AND FINDINGS

Initial Findings

On March 26, 1999, the agency issued notice proposing to removal the appellant from his position of Clinical Nurse, GS-09, for failure to meet the suitability requirements of a clinical nurse who has regular contact or control over Indian children. This case raises questions of due process and fairness in the agency's implementation of the Indian Child Protection and Family Violence Prevention Act, ("the Act"), 25 U.S.C. § 3207.

After review of the Congressional Record, I find that one of the stated purposes of the legislation was to prevent abuse of Indian children by persons employed by the Federal government. However, I find no evidence to show that Congress ever intended that Federal employees be summarily removed without any consideration of mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280,

306 (1981), when convicted of any "crime against a person," the definition of which may include misdemeanor verbal threats, without regard to the nature of the crime, *i.e.*, whether the crime involved child abuse or domestic violence, whether a misdemeanor or a felony, whether on or off-duty, or even how long ago the conviction occurred. And, for the reasons set forth below, I find that the agency has failed to show, that the appellant does not meet the suitability requirements for his position under the Act.

Background

The appellant is 56 years of age. The undisputed evidence of record[1] shows that he served in the United States Navy from May 31, 1960, through September 27, 1963, and completed his military service ranked E-6. Thereafter, he was employed as a Machinist and a Marine Pipefitter. In 1971, he worked briefly as a Pipefitter for the Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington. Prior to beginning nursing school in 1981, the appellant was employed as a journeyman pipefitter in various power plants, steel mills, and refineries. *See* Initial Appeal File (IAF), Tab 19, Exhibit 6.

The appellant completed his Registered Nurse (RN) degree at Trinity School of Nursing, Minot, North Dakota on June 3, 1983. The appellant worked at various rural hospitals and nursing homes in North Dakota, and two years at a larger hospital in Bismarck, North Dakota, until he was

1. A Board hearing was held in the appeal on July 16, 1999. Accordingly, this decision is based on the testimonies of record, the documentary submissions of record, and the arguments of counsel.

selected for the position of Clinical Nurse, GS-09, with the agency's Indian Health Service (IHS), Turtle Mountain Chippewa Indian Hospital, in Belcourt, North Dakota, on May 30, 1993. *See* Transcript (Tr.), p. 75-6. Thereafter, the appellant and his spouse, also an RN with the IHS, applied for daytime Clinical Nurse positions at the IHS clinic in Pine Ridge, South Dakota.

The appellant and his spouse were selected for the Clinical Nurse positions at the agency's Pine Ridge Clinic in South Dakota. The appellant's voluntary reassignment to the position of Clinical Nurse, GS-09, in Pine Ridge was effective January 19, 1997. His performance appraisals, both at Belcourt and Pine Ridge, were always fully successful. Although the appellant was not rated outstanding or excellent, he was always rated fully competent and received his within-grade increases annually. *See* IAF, Tab 19, Subtab 6.

The appellant had no prior discipline in the Federal service and no record of any criminal misconduct of any kind at the age of 56, until November 1998.[2] On November 14,

---

2. On November 12, 1998, the appellant received a non-disciplinary letter of counseling, not made a part of his Official Personnel File (OPF), for yelling at his supervisor. However, I find that the agency failed to cite the letter of counseling in its notice of proposed removal, dated March 26, 1999, and there is no evidence to show that the appellant was on notice that his letter of counseling was considered by the agency. Therefore, I find that the agency is precluded from citing the letter of counseling before the Board for purposes of penalty enhancement. *See Murdock-Doughty v. Department of the Air Force*, 70 M.S.P.R. 119, 123-24 (1996); *Maddux v. Department of the Air Force*, 68 M.S.P.R. 644, 646 (1995).

1998, the appellant was off-duty and driving to Rapid City, South Dakota with his wife and infant child for a Christmas shopping trip. Near Hayspings, Nebraska, the appellant and a local resident were involved in a verbal dispute on the road. The appellant acknowledged that he and the local driver pulled off to the side of the road where the argument continued. There is a dispute as to what occurred during the verbal confrontation and whether any weapons were brandished by the appellant or the other driver. However, it is clear that the confrontation never became physical, *i.e.*, there was no physical assault, fighting, or touching of any kind on the part of the appellant or the local driver. The appellant testified during the Board hearing that the local driver threatened him and his wife with an iron bar. *See* Tr., p. 87. The appellant averred that he never threatened the other driver with a firearm or any other type of weapon. *Id.*, at 89. Shortly after the incident, the local driver, Dean Huckfeldt, made a complaint to the Rushville Sheriff's Department, Nebraska, reporting that the appellant, driving a maroon vehicle, cut him off and when the two pulled off the road, the appellant threatened him with a firearm. Huckfeldt had the license plate number of the maroon vehicle and the appellant was the registered owner.

On November 16, 1999, the County Court of Sheridan County, Nebraska, filed a complaint against the appellant charging him with two felony counts: 1) Threatening to commit a crime of violence with intent to terrorize another; and 2) using a firearm, or other deadly weapon, to commit a felony to wit: Terroristic Threat. The appellant testified, during the Board hearing, that the police contacted him and told him of his impending arrest. Therefore, the appellant

contacted a lawyer and he also telephoned his immediate supervisor, Merry Afraid of Bear, in the evening hours, and told her that criminal charges had been filed against him. *See* Tr., p. 9 (Testimony of Marjorie Murdock, Director of Nursing). Merry Afraid of Bear then told the appellant's second line supervisor, Director Murdock, that the specific charges were "terroristic threatening with firearms." Tr., p. 9. As a result of the appellant's disclosure to the agency, Merry Afraid of Bear proposed his indefinite suspension, without pay, pending the outcome of the criminal charges pursuant to 5 C.F.R. § 752.402(e). Director Murdock sustained Merry Afraid of Bear's proposal, and the appellant's indefinite suspension was effective December 31, 1998.[3]

On January 26, 1999, the appellant pled guilty to the lesser misdemeanor offense of attempted terroristic threats, *i.e.*, that on November 14, 1998, he "did attempt to commit a crime of violence with intent to terrorize another, to wit: Dean Huckfeldt, or with reckless disregard of the risk of causing such terror. (Sec. 28-311.01, Class I Misdemeanor)." IAF, Tab 12, Subtab 4H. During the Board hearing, the appellant testified that in pleading guilty to the misdemeanor, he was acknowledging that he should not have followed the other driver or confronted him in any way; he should have left the scene. *See* Tr. 91.

---

3. By initial decision, dated April 12, 1999, the Board affirmed the agency's action that indefinitely suspended the appellant pending the outcome of the criminal charges. That initial decision became final on May 17, 1999, when no petition for review was filed on the matter. *See Johnson v. Department of Health & Human Services*, DE-0752-99-0122-I-1 (Initial Decision, April 12, 1999).

Appendix C

On March 2, 1999, the appellant was sentenced to a two-year term of probation where he agreed not to possess a firearm or dangerous weapon, not to violate any laws, to remain employed and support his family, to undergo counseling, not to change his address or leave the States of Nebraska or South Dakota, to pay a fine of $1,000.00 and to serve a term of 90 days in jail beginning on November 28, 2000. *See* IAT, Tab 12, Subtab 4F. The appellant testified that if he completed his period of probation successfully, the 90 days jail-time would be waived. *See* Tr., p. 95.

On March 26, 1999, Director Murdock proposed the appellant's removal on the specific charge of: "Failure to meet the suitability requirements of a clinical nurse who has regular contact or control over Indian children." IAF, Tab 12, Subtab 4E. The two specifications were: (1) As a clinical nurse, the duties of your position require that you have regular contact with Indian children; and (2) On January 26, 1999, you entered a plea of "no contest," or "nolo contendere," to a crime against a person under state law. Ms. Murdock considered the appellant unsuitable to remain employed in the position of clinical nurse pursuant to the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3207. And, on April 21, 1999, the deciding official, Vern Donnell, Service Unit Director, Pine Ridge Indian Hospital, agreed that the appellant's removal would promote the efficiency of the service. Donnell found that he was obligated under the Act to "protect the Indian children from individuals who have committed crimes that pose a threat to their well being." *Id.*, at 4C. During the Board hearing, Donnell testified that he did not consider the *Douglas* factors, instead he removed the appellant in reliance

on the Act. *See* Tr., p. 32. And, Donnell testified that he understood, under the Act, that he "had no alternative" but to remove the appellant, even though the appellant had not been convicted of any sex crime or crime of violence. *Id.*, at 30. Moreover, Donnell testified that if he had applied the *Douglas* factors, knowing what he now knows about the incident, he probably would not have selected the penalty of removal. *Id.*, at 42.

Burden of Proof

The agency's action will be sustained only if it is supported by preponderant evidence, 5 U.S.C. § 7701(c)(1)(B); the existence of a nexus between the sustained charge and the efficiency of the service, 5 U.S.C. § 7513(a); and the reasonableness of its penalty. The appellant must prove his affirmative defense of prohibited discrimination on the basis of race and national origin, *i.e.*, non-Native-American (Indian), by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (1999).

The agency did not establish by preponderant evidence that the appellant is ineligible to perform the duties of his position.

The Act requires the Secretary of the Interior and the Secretary of Health and Human Services to:

> (1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,
>
> (2) conduct an investigation of the character of each individual who is employed or is being considered for employment by the respective Secretary in a position listed pursuant to paragraph (1), and
>
> (3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.

25 U.S.C. § 3207(a). The Act also provides:

> The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

25 U.S.C. § 3207(b). The Department of Health & Human Services, IHS, has listed the appellant's position as one subject to the requirements of the Act because it involved regular contact with Indian children. *See* IAF, Tab 12, Subtab 4J. I find that the Act gives the agency authority to identify covered positions. Further, the agency has submitted the

sworn statement and records of the appellant's supervisor, Merry Afraid of Bear, showing that the appellant is required to rotate through the pediatrics unit and may spend up to one-third of his time in pediatric care. *See* IAF, Tab 18, Subtab 1. Accordingly, I find that the Board should defer to the agency's internal management assessment of the appellant's position, Clinical Nurse, as a "covered position" under the Act.

The agency asserted that, because the appellant worked in a position that involved regular contact with Indian children who were patients at the hospital, his misdemeanor conviction of an off-duty threat of violence rendered him unsuitable for the position under the Act. The agency's interpretation of the Act creates a *per se* rule under which employees convicted of any "crimes against persons" are automatically ineligible, regardless of mitigating factors or the seriousness of the offense. The agency contended that it had no discretion under the law to weigh the appellant's length of employment, his subsequent counseling and rehabilitation, the circumstances of the incident, or the seriousness of the misconduct proscribed by the Act. The agency asserted that its only responsibility under the Act was to search for an available vacant position that did not involve regular contact with Indian children, to which the appellant could be assigned. The agency stated that there was no such position available given that the appellant was a non-Indian and not covered by the Indian Preference laws, 25 U.S.C. § 472. And, as noted above, Mr. Donnell, the deciding official, acknowledged that he decided to remove the appellant because the Act required this determination, and not because the appellant was unsuitable for the position

as a result of poor performance or misconduct. Because the agency maintains that the Act mandates no other outcome, the Board must determine whether the agency's statutory interpretation is entitled to deference.

The Supreme Court addressed the issue of statutory interpretation in its decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1983). In that case, the Court held that if the intent of Congress is clear, then "that is the end of the matter;" the agency, as well as the court, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 843. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

The Court explained that, if Congress explicitly left a gap for the agency to fill, then this qualifies as an express delegation of authority to the agency to fill in the gaps in the statute. Under these circumstances, agency regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.*; *see generally Diehl v. Office of Personnel Management*, 50 M.S.P.R. 519, 522 (1991) (interpretation of a statute by the agency charged with its administration should generally be followed unless there are compelling indications that it is wrong). When the legislative delegation to an agency on a particular question is implicit,

a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844; *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 10 (1998).

In a subsequent holding, the Court explained that interpretive rules are not accorded the same weight as agency regulations because they are not subject to a notice and comment procedure. *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 88 (1995) *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency interpretations are not controlling, but do constitute a body of experience to which the courts may properly turn for guidance). The United States Court of Appeals for the Fifth Circuit, following the Supreme Court's line of reasoning in *Shalala*, provided several factors to consider in determining the amount of deference that a court must give to agency interpretations. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1014 n.20 (5th Cir. 1996). These factors include "the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into their formulation, and the nature of the agency's expertise." *Id.*; *see also Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

In this case, the Act clearly provides explicit authority to Bureau of Indian Affairs (BIA) and HHS,[4] to determine

---

4. Section 2001 of Title 42 of the United States Code provided that all functions and responsibilities of the BIA relating to the maintenance and operation of hospital and health facilities for Indians, were transferred to the supervision and direction of HHS. 42 U.S.C. § 2001. IHS is a component agency of HHS.

which positions were covered by the Act, to conduct background checks on employees in positions that involved regular contact with Indian children, and to promulgate regulations that set the minimum standards of character for those positions. In order to provide guidance on the Act, the agency released a Notice of Proposed Rulemaking for 42 C.F.R. Part 36, Indian Child Protection and Family Violence Prevention Minimum Standards of Character. The agency sought comments to the Notice of Proposed Rulemaking. *See* IAF Tab 17, Exhibit B. The agency's proposed rules provide that if employees are in positions having regular contact with children, they are automatically ineligible for employment if they have been convicted of crimes against persons. The rules allow the adjudicating officer to consider other relevant factors only if the employee does not have "regular contact with children". *Id.*

To instruct supervisors on how to implement the Act, HHS provided internal guidance interpreting the Act.[5] In a memorandum dated February 3, 1997, from Michael H. Trujillo, M.D., M.P.H., Assistant Surgeon General, Area Directors were informed that HHS and OPM had entered into an agreement, under which OPM would conduct special background investigations on child care workers, known as Child Care National Agency Check with Written Inquiries (CNACI), in order to comply with the requirements of the Act. The memorandum specifically indicated that CNACI

---

5. Although the agency issued multiple memoranda providing guidance to supervisors on all aspects of the Act, the agency failed to submit any internal memorandum or other guidance as to its definition oil an assault or a crime against a person under the Act. *See* IAF, Tab 12, Subtab 4M.

would ensure that IHS had the information necessary to determine suitability for employment in IHS child care worker positions. HHS further indicated that IHS would determine that the minimum standards of character required by the act would be met after the completion of a satisfactory investigation. *See* IAF, Tab 12, Subtab 4M, Attachment E.

The agency distributed an attachment to this memorandum with guidance for supervisors taking adverse actions pursuant to the Act. The agency stated that, in the absence of final regulations, the minimum standards of conduct under the Act were met upon the completion of a satisfactory investigation, citing the memorandum from Dr. Trujillo. The agency emphasized that continued employment in a position covered by the Act was conditional on maintaining eligibility to perform the duties of the position. Employees who no longer met the requirements of a position had to be removed from their positions. The agency also emphasized that an adverse action under 25 U.S.C. § 3207 did not relate to suitability, but to the basic eligibility requirements of the position based on the criteria set forth in the Act. The agency stated that the agency did not have the authority to ignore the law, even if the charge against the employee was old. The agency further stated that supervisors should attempt to find placements for employees who should be separated under the Act, but that if no such position is available, the agency had to remove the employee from the covered position. The agency noted that "[t]he strength of our position and how the courts will interpret the law will be determined as cases are heard before a third party. For this reason we recommend that most charges be filed under the qualification requirement so that we can develop a set of

similar cases and case law." *Id.*, at Attachment F. As noted, the agency submitted no internal memorandum or other guidance as to its proposed definition of an assault or "crimes against a person" under the Act. *See* IAF, Tab 12, Subtab 4M.

Pursuant to the Act, David W. Azure, Personnel Officer, Aberdeen Area Office for IHS, testified that the agency's Headquarter's office with the assistance of area managers, complied a tentative list of covered positions on October 20, 1994. *See* IAF, Tab 12, Subtab 40, and Tr., pp. 50-51. The agency's list of positions covered under the Act was amended on April 17, 1997, and the area offices were advised that positions must independently be reviewed on a case by case basis to determine whether the employee has regular contact with, or control over, Indian children. *See* IAF, Tab 12, Subtab 4M. Thereafter, the Aberdeen Area Office reviewed its positions and identified the positions it believed were covered under the Act; the agency identified the appellant's position as covered. All employees in covered positions were required to complete the background investigation form, CNACI. *Id.*, at Tab 4L. The Office of Personnel Management (OPM) conducted the 1997 background investigation of all current employees, arguably including the appellant. There is no evidence to show that the appellant was unsuitable for the position of Clinical Nurse, during the agency's 1997 investigation. Personnel Officer Azure testified that the agency had not conducted, and had no current plans to conduct ongoing background investigations of its employees. The undisputed evidence of record shows that the agency has only conducted background investigations on new hires (appointees) and has made no attempt to learn, after 1997, of criminal convictions during

the course of employment, *i.e.*, after it began to implement the Act in 1997, or anytime after the initial appointment. *See* Tr., pp. 66-68.

The appellant argued that the Act, contrary to the agency's interpretation, is a suitability provision that applies, by its specific language, to "ensure that none of the individuals appointed" to covered positions are guilty of "crimes against persons." IAF, Tab 17 (Appellant's Prehearing Brief). Therefore, the appellant argued that the terms of the statute are meant to preclude the appointment of employees guilty of more than one crime against persons, not the removal of permanent employees for a single misdemeanor conviction not involving a crime of violence, domestic or family violence, child abuse or a sex crime. Further, the appellant noted that the agency's interpretation of the Act is in direct conflict with the BIA's interpretation of the same Act. The BIA has implemented regulations which allow for management discretion on removal actions brought under the Act.

The evidence in the record shows that the agency made its decision to remove the appellant based on its internal guidelines cited above, the guidelines might be persuasive on the basis that the agency has implicit authority to interpret the Act. The internal guidance and proposed rules might, therefore, be considered permissible constructions of the Act entitled to deference by the Board. However, the agency's guidance has not been formally codified, nor was it proposed at the effective date of the appellant's removal. Further, I find that the agency has failed to show, either by submitting internal guidelines or other supporting evidence, that it has made any effort to define "crimes against persons" under

the Act. Further, the agency has provided no showing of consistency, consideration, expertise or internal policy reasons to support its proposed interpretation of the Act. While the BIA, like the IHS, defined crimes against persons under local law, it allowed discretion to its managers to interpret whether the crime was serious or one intended to be covered under the Act. Moreover, Congress may well have intended persons guilty of non-sex and non-violent crimes, but multiple lesser crimes against persons, be covered by the Act. Given that the agency has failed to codify regulations pursuant to the Act and that the agency has expressed a desire for the courts to clarify the issue of discretion in the Act, I find that the agency's internal guidance and proposed rules can only be considered persuasive authority not entitled to the deference described in the Supreme Court's holding in *Chevron*.

Assuming that the proposed rules have persuasive authority, I find that they cannot be applied retroactively to the appellant. The Board has held that the regulations in effect at the time when an action commences — or when it is proposed — are the regulations that are generally applicable. *Bucci v. Department of Education*, 43 M.S.P.R. 558, 562-63 (1990). Here, the agency's guidance had not been subject to codification at the time of the appellant's April 30, 1999 removal. See Indian Child Protection and Family Violence Prevention Act Minimum Standards of Character, 64 Fed. Reg. 14,560 (1999) (to be codified at 42 C.F.R. pt. 36) (proposed Mar. 25, 1999)[6]. I find that the agency has failed to demonstrate that its proposed rules, not yet codified,

6. The appellant's removal was proposed on March 26, 1999, just one day after the agency's proposed rules were published in the Federal Register for notice and comment.

should be applied retroactively, on the basis that they were proposed prior to the appellant's removal. *See generally Radford v. Office of Personnel Management*, 69 M.S.P.R. 250, 255 (1995) (retroactive application of administrative rules generally not favored). Therefore, I find that, in the absence of controlling authority from the agency, the Board must look to other sources of guidance to interpret the Act.

The Board has held that the starting point for every case involving statutory construction must be the language of the Act itself. When interpreting statutory language, plain and unambiguous meaning prevails absent clearly expressed legislative intent to the contrary. *Hargrove v. Department of Defense*, 77 M.S.P.R. 266 (1998). In the instant case, however, the Act is silent as to whether an adjudicating official has the discretion to consider other factors when determining whether an employee should be removed, pursuant to the Act.

The legislative history of the Act does not clearly and unambiguously indicate whether deciding officials have discretion in personnel decisions. Senator McCain stated that the purpose of the legislation was "to provide the tools necessary for Indian tribes to establish or improve existing child protection and family services." 136 CONG. REC. S3240 (daily ed. March 27, 1990). Senator Inouye reported that the Senate Select Committee on Indian Affairs had heard reports of sexual molestation of Indian children on Indian reservations by BIA employees and teachers. S. Rep. 101-403 at 1 (July 30, 1990). He further reported that "[t]he Committee expects the Bureau of Indian Affairs and the Indian Health Service to develop policies consistent with local tribal laws

to ensure the maximum protection for Indian children." *Id.* at 4. Congressman Udall, a member of the House Committee on Interior and Insular Affairs, cited cases of abuse of Indian children by persons employed by the Federal government, specifically recounting an instance in which BIA failed to take action against a teacher who sexually abused 142 Hopi children, despite repeated reports to the BIA about his activities. H. Rep 101-876 at 18 (October 15, 1990).

The history of the Act shows that Congress intended to afford the maximum protection for Indian children and that there was concern about incidents where Federal employees abused Indian children. I note that the cases cited by Congress involved egregious examples of abuse of Indian children by Federal employees primarily occurring in the educational context or child care context. *See Swentek v. Office of Personnel Management*, 76 M.S.P.R. 605, 611 (1997) (it is the Board's task to interpret words of a statute in light of the purpose Congress sought to serve). Despite the clear concern for the protection of Indian children, however, the legislative history does not clearly reflect the intent of Congress with respect to the amount of discretion given to adjudicating officials in deciding whether to remove an employee following a background investigation. Further, there is no indication as to whether, in making a decision to remove an employee, mitigating factors could be taken into account, such as the nature and seriousness of the offense.

The Act is punitive in nature and should, therefore, be construed in favor of the appellant. The Board has held that where a statute imposes penalties, it must do so in clear terms

to avoid unfairness and arbitrary enforcement. Punitive Acts should be strictly construed in favor of persons on whom penalties are sought to be imposed, and against the parties seeking to enforce statutory penalties. *See Special Counsel v. DeMeo*, 77 M.S.P.R. 158, 161-62 (1997). The appellant, as a result of a misdemeanor off-duty conviction, has been removed subject to the Act. Given the seriousness of this penalty, and the absence of agency regulations that provide guidance on how to apply the Act, the Board should construe the requirements of the law in favor of the appellant by determining whether his removal was warranted in light of other factors.

As noted above, the agency's regulations were not in effect at the time of the appellant's removal; however, I note that the BIA regulations were in effect at the time of the appellant's removal. Those regulations were promulgated under the same statutory provision at issue in this appeal and while those regulations are not controlling, they provide significant guidance. BIA's regulations, codified in 25 C.F.R. Part 63, provide detail on what factors an adjudicating or deciding official must use to determine whether to remove an employee. BIA's regulations were in force at the time of the appellant's removal. The regulations provide that each case is judged on its own merits, and that adjudicating officials must consider all available information, favorable and unfavorable, in terms of accuracy, completeness, relevance, seriousness, overall significance, and how similar cases have been handled in the past. 25 C.F.R. § 63.17(b) (1998). The regulations further provide that the official must consider prior conduct in light of the nature and seriousness of the conduct in question, the recency and circumstances

surrounding the conduct in question, the age of the individual at the time of the incident, societal conditions that may have contributed to the nature of the conduct, the probability that the individual will continue the type of behavior in question, and the individual's commitment to rehabilitation and a change in the behavior in question. 25 C.F.R. § 63.18(f) (1998). The regulations state that the employer "*may* deny employment or dismiss an employee when an individual has been found guilty of or entered a plea of guilty or nolo contendere to any Federal, state or tribal offense involving . . . crimes against persons." 25 C.F.R. § 63.19(a) (1998) (emphasis added). The regulations do not, however, state that the employer must dismiss the employee if he or she falls within the language of the Act.

When the appellant's case is considered in light of the factors listed above, I find that his misdemeanor conviction for off-duty threats does not render him unsuitable for employment in the position of Clinical Nurse. In this case, the appellant's conviction occurred off-duty. The appellant testified credibly that he was 56 years old and this incident was his first and last brush with the law. The appellant is undergoing psychological counseling and he testified that he has "learned from this lesson." Tr., at 94. He averred: "I'm a highly skilled nurse with a great deal of concern for people and this was totally out of character . . . . Children are my joy, I have six of them and one on the way." *Id.* I find that the appellant does not have a history of criminal convictions; there is no evidence to show that he is a risk to commit sexual assault, sexual abuse, child abuse or violent crime. In sum, I find that the appellant is not the type of person intended to be covered by the Act. I find that Congress

specifically meant to prevent child abuse and sex crimes. The Act specifically references "sexual assault" and such a specific reference would have been unnecessary if Congress had intended that *all* assaults were covered under the Act. Moreover, I have given weight to the appellant's argument that the specific language of the Act requires that a non-sex assault crime be multiple "crimes against persons," *i.e.*, not just one misdemeanor threat of crime but a history of assault or violence.

As noted, the appellant has been seeking treatment. Further, he was suspended without pay for four months during his indefinite suspension pending the outcome of his criminal plea. I find that the appellant should continue to work as a condition of his misdemeanor probation. I find that he has been disciplined appropriately and he has expressed a great degree of remorse for his misconduct. Given the appellant's age and history, I find little reason for the harsh penalty of removal. Further, the agency's deciding official acknowledged that given all the mitigating factors, removal would probably not have been his decision. For all the reasons stated above, I find that the appellant is suitable for continued employment as a Clinical Nurse, GS-09. The agency's charge is found not sustained.

Affirmative Defense: Prohibited Discrimination

An employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more

harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Although I have found that the agency's action must be reversed, the appellant asserted an affirmative defense that must be adjudicated. *See Marchese v. Department of the Navy*, 32 M.S.P.R. 461, 464 (1987). The appellant alleged that the agency's action was the result of prohibited discrimination on the basis of race and national origin, *i.e.*, non-Native-American (non-Indian). *See* IAF. Tab 1.

I find that the appellant has failed to put forth a comparison employee, or show that he was specifically treated differently that Indian employees under the same or similar circumstances. I find that the agency's deciding official, Donnell, testified credibly that the reason for his decision to remove the appellant from his position was the result of the agency's interpretation of the Act, and for no other reason. Upon consideration of the evidence, I find that the appellant did not establish that the agency's action was the result of prohibited discrimination.

DECISION

The agency's action is REVERSED.

ORDER

I ORDER the agency to cancel the removal and to retroactively restore appellant effective *April 30, 1999*. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

Appendix C

I ORDER the agency to pay appellant by check or through electronic funds transfer for the appropriate amount of back pay, with interest and to adjust benefits with appropriate credits and deductions in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. I ORDER the appellant to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, I ORDER the agency to pay appellant by check or through electronic funds transfer for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

I ORDER the agency to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant must ask the agency about its efforts to comply before filing a petition for enforcement with this office.

INTERIM RELIEF

If a petition for review is filed by either party, I ORDER the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective as of the date of this decision and will remain in effect until the decision of the Board becomes final.

Appendix C

As part of interim relief, I ORDER the agency to effect the appellant's appointment to the position of Clinical Nurse, GS-09. The appellant shall receive the pay and benefits of this position while any petition for review is pending, even if the agency determines that the appellant's return to or presence in the workplace is unduly disruptive.

Any petition for review or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order, either by providing the required interim relief or by satisfying the requirements of 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). If the appellant challenges this certification, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. If an agency petition or cross petition for review does not include this certification, or if the agency does not provide evidence of compliance in response to the Board's order, the Board may dismiss the agency's petition or cross petition for review on that basis.

FOR THE BOARD: s/ Laura M. Albornoz
Laura M. Albornoz
Administrative Judge

* * * *